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No. 77

In the Supreme Court of the United States

OCTOBER TERM, 1961

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

WALTON MANUFACTURING COMPANY AND LOGANVILLE PANTS COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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INDEX

	Page
Opinions below	1
Jurisdiction	2
Statute involved	2
Question presented	2
Statement	2
A. The Board's findings of fact and the supporting evidence	2
1. The Company's acts of interference, restraint and coercion	3
2. The discharge of four employees active in the union effort	5
(*a*) Lucille Yancey	5
(*b*) Grace McCart	7
(*c*) Pearl Coker	8
(*d*) Ruth Brooks	9
3. The layoff of nine employees named by the Union as members of its organizing committee	10
(*a*) Lela Beaver	12
(*b*) Nellie R. Wood	14
(*c*) Evelyn Hudson	15
(*d*) Violet Ewing	16
(*e*) Bonnie Hamilton	17
(*f*) Frances Johnson Powell	18
(*g*) Ida Harper	19
(*h*) Pauline McGee	20
(*i*) Nellie Hood	21
B. The Board's conclusions and order	22
C. The decision of the court of appeals	23
Summary of argument	24

624089—62——1

	Page
Argument	28
I. A reviewing court may not displace the Board's factual choice between two conflicting views if the choice is supported by substantial evidence on the record as a whole	28
A. The standard of review with respect to the Board's findings of fact	28
B. The standard of review is the same for discriminatory discharge cases as it is for other types of unfair labor practices	31
II. Substantial evidence on the record as a whole supports the Board's findings that the employees were discharged and laid off because of their union activities	37
A. The discharges	38
B. The layoffs	45
Conclusion	50
Appendix	51

CITATIONS

Cases:

Agwilines v. *National Labor Relations Board*, 87 F. 2d 146 — 32

Angwell Curtain Company v. *National Labor Relations Board*, 192 F. 2d 899 — 39

Dyer v. *MacDougall*, 201 F. 2d 265 — 35

E. Anthony & Sons v. *National Labor Relations Board*, 163 F. 2d 22, certiorari denied, 332 U.S. 773 — 42

Frosty Morn Meats, Inc. v. *National Labor Relations Board*, No. 18,464, decided November 30, 1961 — 34

Hartsell Mills Co. v. *National Labor Relations Board*, 111 F. 2d 291 — 36

Motorola, Inc. v. *National Labor Relations Board*, 199 F. 2d 82, certiorari denied, 344 U.S. 913 — 48

National Labor Relations Board v. *Bird Machine Co.*, 161 F. 2d 589 — 47

National Labor Relations Board v. *Carolina Mills*, 190 F. 2d 675 — 45

National Labor Relations Board v. *Des Moines Foods, Inc.*, No. 16, 694, decided November 29, 1961 — 34

National Labor Relations Board v. *Dixion Coil Co.*, 201 F. 2d 484 — 29, 47

Cases—Continued

	Page
National Labor Relations Board v. *Dixie Shirt Co.*, 176 F. 2d 969	37
National Labor Relations Board v. *Fant Milling Co.*, 360 U.S. 301	31
National Labor Relations Board v. *Florida Citrus Canners Cooperative*, No. 94, this Term	2, 29, 31, 33, 35, 36, 38, 39, 48
National Labor Relations Board v. *Harris-Woodson Co.*, 162 F. 2d 97	39
National Labor Relations Board v. *Houston Chronicle Publishing Co.*, 211 F. 2d 848	33
National Labor Relations Board v. *Howell Chevrolet Co.*, 204 F. 2d 79, affirmed, 346 U.S. 482	35
National Labor Relations Board v. *Huber & Huber Motor Express, Inc.*, 223 F. 2d 748	33
National Labor Relations Board v. *Ingram*, 273 F. 2d 670	33
National Labor Relations Board v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1	37
National Labor Relations Board v. *Link-Belt Co.*, 311 U.S. 584	29, 40, 42, 49
National Labor Relations Board v. *McGahey*, 233 F. 2d 406	33, 36
National Labor Relations Board v. *Nevada Consolidated Copper Corp.*, 316 U.S. 105	25, 29, 35
National Labor Relations Board v. *Pittsburgh S.S. Co.*, 340 U.S. 498	47
National Labor Relations Board v. *Radcliffe*, 211 F. 2d 309	47
National Labor Relations Board v. *Ridge Tool Co.*, 211 F. 2d 88, enforcing, 102 NLRB 512	40
National Labor Relations Board v. *Rutter-Rex Mfg. Co.*, 229 F. 2d 816	33
National Labor Relations Board v. *Sifers Candy Company*, 171 F. 2d 63	45
National Labor Relations Board v. *Tex-O-Kan Flour Mills Co.*, 122 F. 2d 433	25, 31, 32, 33, 35, 38
National Labor Relations Board v. *Waterman Steamship Corp.*, 309 U.S. 206	30
National Labor Relations Board v. *Whitin Machine Works*, 204 F. 2d 883	44

Cases—Continued

North Carolina Finishing Co. v. *National Labor Relations Board*, 133 F. 2d 714, certiorari denied, 320 U.S. 738 — Page 42

Radio Officers' Union v. *National Labor Relations Board*, 347 U.S. 17 — 29

Universal Camera Corp. v. *National Labor Relations Board*, 340 U.S. 474 — 2, 24, 26, 28, 29, 30, 35, 38

Statute:

National Labor Relations Act, as amended, 61 Stat. 136, 29 U.S.C. 151, *et seq.*, *and Supp. II:*

Section 7 — 51

Section 8(a)(1) — 3, 22, 23, 31, 33, 38, 45, 49, 50, 51

Section 8(a)(3) — 3, 23, 49, 50, 51

Section 10(c) — 37, 52

Section 10(e) — 2, 24, 25, 28, 34, 50, 54

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OPINIONS BELOW

The opinion of the court of appeals (R. 721–733)[1] is reported at 286 F. 2d 16. The findings of fact, conclusions of law, and order of the Board (R. 57–161, 252–264) are reported at 124 NLRB 1331.

[1] Since the three volumes of the record are consecutively paginated, the specific volume number will not be cited. The page references preceding the semicolon are to findings by the Examiner and Board; the page references following the semicolon are to the supporting evidence in the record.

JURISDICTION

The judgment of the court of appeals (R. 734) was entered on January 6, 1961. The petition for a writ of certiorari was filed on April 6, 1961, and was granted on October 9, 1961 (R. 749, 368 U.S. 810). The jurisdiction of this Court rests on 28 U.S.C. 1254(1) and Section 10(e) of the National Labor Relations Act, as amended.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. 151, *et seq.*) are set forth in the Appendix, *infra*, pp. 51–55.

QUESTION PRESENTED

Whether the court below, by setting aside the Board's findings that employees had been discharged and laid off for union activity, "grossly misapplied" the standard of review laid down in *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 488, by "displac[ing] the Board's choice between two fairly conflicting views."[2]

STATEMENT

A. THE BOARD'S FINDINGS OF FACT AND THE SUPPORTING EVIDENCE

The Board found that respondent,[3] a manufacturer of men's and boys' clothing, had interfered with, re-

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[2] A related question is presented in *National Labor Relations Board* v. *Florida Citrus Canners Cooperative*, No. 94, this Term, set for argument following the present case.

[3] The two respondents—Walton Manufacturing Company and Loganville Pants Company—will be referred to as the Company or the respondent. The Board found that, since the two respondents were commonly owned and managed, and functioned as an integrated operation, they constituted a single employer for purposes of the Act (R. 61–62).

strained and coerced its employees, in violation of Section 8(a)(1) of the Act, by keeping union organizers under surveillance, threatening employees with economic reprisals if they joined the Union,[4] and interrogating employees concerning the Union's activities. The Board also found that respondent violated Section 8(a) (3) and (1) of the Act by discharging four employees, and laying off nine others, because of their union activity.[5] The facts supporting these findings may be summarized as follows:

1. *The Company's acts of interference, restraint and coercion.*—In November 1957, the Union embarked on a campaign to organize respondent's employees (R. 65; 276–277). The Company countered with a letter to all employees announcing new employee benefits, including additional holidays, paid vacations, and a pension program, and emphasizing that "* * * no employee has to pay dues or initiation fees to any outside union * * * for the privilege of working here" (R. 65; 474–477).

On November 30, J. B. Stephens, a brother of one of respondent's supervisors and himself an employee of the Company, followed, in a car, union organizer Broom as she visited the homes of several of respondent's employees to solicit their support for the Union (R. 66–68; 286–294). The car used by Stephens was owned by Morris Scharff, the Company's principal

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[4] Amalgamated Clothing Workers of America, AFL–CIO.

[5] The issue in the present case arises from these latter findings. The court below sustained, with two exceptions, the Board's findings with respect to the other violation of Section 8(a)(1) (see *infra*, p. 23).

managerial official (R. 66, 64–65; 190–191, 294–295, 719–720). Stephens reported back to Scharff, and took him to a restaurant where Broom and several other organizers were having lunch (R. 66; 719). Stephens pointed out the organizers' cars to Scharff, who copied down the license numbers (R. 66; 286–287, 719).

In the next two months, Scharff and respondent's supervisory personnel engaged in widespread efforts to determine which of the employees had joined the Union and to induce them to reject it. Following one union meeting, Scharff questioned employee Grace McCart (see *infra*, pp. 7–8) as to whether she attended the meeting and whether she knew who else was there. McCart indicated she had been present, but refused to name anyone else. Scharff replied that he knew everyone who had attended anyhow, and proceeded to identify three employees—Pearl Coker, Ruth Brooks, and Jeanette Beaver—whom he considered to be very active in the Union's organization attempt (R. 73; 352–354, 461–463). Similarly, Supervisors Ewing, Carter and Atha asked several employees whether they had been contacted by the Union and what they knew about it (R. 256–257; 342, 380, 429, 431–432).

During this same time, Company representatives made threats to close the plant and threats of discharge. Shortly after the surveillance of the union organizers, Scharff made a series of speeches[6] to the

[6] Scharff's speeches were from the same notes and hence their content was substantially the same (R. 70).

employees concluding with the statement (R. 69–71; 357–358, 365–366, 471):

> * * * [I]f you want a Union shop, you are going to have it without me, because I have had my stomach full of Unions, because I can't take orders from New York. I can't take an order to be unfair to one person or another. I will have no part of it.

Subsequently, Scharff told employee Lela Beaver (see *infra*, pp. 12–14) that, if the Union came in, he would "go out the back door" (R. 117; 333). Supervisor Higgins informed employee Pearl Coker (see *infra*, pp. 8–9) that the Company had announced at a supervisors' meeting that it would close the plant rather than operate with a union (R. 76; 336–337). Similarly, Supervisor Myrtle Ewing warned employee Pauline McGee (see *infra*, pp. 20–21), while she was discussing the Union with two other employees at lunch, that "[i]f you don't want to dig your own grave, you had better shut up talking about the Union" (R. 76–77; 304); and she told another employee—her sister-in-law Violet Ewing (see *infra*, pp. 16–17)—that "Morris [Scharff] said that he didn't care how good an operator a girl was, or who she was, * * * he would fire her if he found out she had joined the Union" (R. 77; 342).

2. *The discharge of four employees active in the union effort.*—(*a*) *Lucille Yancey.*—On December 4, 1957, respondent discharged employee Lucille Yancey, an experienced garment worker (R. 83–84; 326–328). Yancey had joined the Union about ten days earlier, and had let the organizers use her home during the

membership drive (R. 84; 328). Plant Superintendent Prosterman[7] told Yancey that there was not enough work for her (R. 84; 329). Yancey insisted on seeing Scharff, who first repeated the reason given by Prosterman, and then, when Yancey stated that there must be another reason, added that her work was unsatisfactory (R. 84; 329–330). The following day, Yancey returned to Scharff's office to inquire further into the reason for her discharge. According to Yancey's testimony, accepted by the Trial Examiner and the Board, Scharff handed her a union paper. Her testimony continues: "So I told him, I said, 'Morris that's another reason you're laying me off.' And he said, 'Well, Lucille, I tell you, I've heard that you and your husband[8] have been working with the union organizers' " (R. 84; 331). Yancey then offered to vote against the Union if Scharff would reinstate her, but he replied that he would not unless the organizing attempt failed (R. 85; 332–333).[9]

Respondent's witnesses testified that the quality and quantity of Mrs. Yancey's work was poor, that she was uncooperative, and that she was discharged for these reasons (R. 85–89). Yancey conceded that she had some trouble sewing linings on coats, but attributed this to the skimpy cut of the material; she added that she had never been told prior to her

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[7] Prosterman is frequently referred to in the testimony as "Mr. Murph" (R. 269).

[8] Yancey's husband was employed as a paid representative of the Railway Clerks Union (R. 85, n. 21).

[9] Scharff's denial that he made the statements attributed to him by Yancey was specifically discredited (R. 97).

discharge that her work was unsatisfactory, but, indeed, had received favorable comments from her supervisors (R. 83–84, 91–92, 94; 326–327, 521–524). The Trial Examiner and the Board credited Yancey's testimony and disbelieved that of the respondent's witnesses (R. 92–96, 94, 252).

(*b*) *Grace McCart.*—Grace McCart attended a union meeting on January 9, 1958 (R. 99; 352–353). The following day, Superintendent Prosterman discharged her, allegedly because too much of her work was bad (R. 99; 351). Not satisfied with Prosterman's explanation, Mrs. McCart went to see Morris Scharff on January 14 (R. 99; 352). Scharff at first told her that she was discharged because of her work, but, when McCart pointed out that she had not received any prior complaints, Scharff asked whether she had attended a union meeting the night before. McCart admitted that she had, and asserted that this was the real reason for her discharge. (R. 100; 352–353.) Scharff then proceeded to interrogate McCart about the meeting, and asked for the names of the employees who had accompanied her (R. 100; 353). McCart refused to divulge the names of the other employees. Thereupon, Scharff replied that he already knew who was at the meeting, and named three employees—Pearl Coker, Ruth Brooks, and Jeanette Beaver—whom he regarded as "heavily pro-union and active in the organizing attempt" (R.

100; 353–354, 462–463).[10] Scharff refused to reinstate McCart, but told her that there might be work for her later on (R. 100; 529). Six weeks later, after the organizing attempt had failed, McCart was rehired for the same job she had performed prior to her discharge (R. 102; 530).

Respondent's witnesses testified that Mrs. McCart was discharged because of a continuous history of poor work (R. 100; 307, 407). McCart gave testimony, which was credited by the Examiner and the Board, that any deficiencies in her work were due to the poor condition of her machine, which required frequent repairs; that respondent was aware of this fact; and that she had never been criticized about her work (R. 99; 346–351).

(*c*) *Pearl Coker.*—Pearl Coker joined the Union during the organizing drive and attended two union meetings, including the meeting held on January 9, 1958 (R. 103; 335). On January 10, she told supervisor Higgins that she had attended the latter meeting, and Higgins replied that it had been announced at a supervisors' meeting that respondent would close the plant rather than operate with a union (R. 76; 336–337). Scharff indicated to McCart that he knew that Coker had attended the meeting and that he regarded her as one of the leading supporters of the Union (R. 100; 463). The day following this statement, Scharff discharged Coker, telling her that, although her work

[10] At the hearing before the Trial Examiner, Scharff admitted his interrogation of McCart and his reference to the other employees, but asserted that he was merely attempting to "reassure" McCart that it was not her participation in union activities that had caused her discharge. The Trial Examiner did not credit this explanation. (R. 73–74, 100; 462.)

was "nice," she was not earning enough (R. 103; 337). Coker suggested that she be transferred to another operation, but Scharff declined to do so (R. 103; 338).

Respondent's witnesses testified that Coker was discharged because the quality of her work was poor and she was the slowest worker in her section (R. 103–104; 308, 416–417). Coker, whose testimony was credited by the Trial Examiner and the Board, stated that, prior to her discharge, no one had told her that she was not doing enough work (R. 103; 338). Superintendent Prosterman conceded on cross-examination that her quality had "improved" and that for the last two months she had been doing satisfactory work (R. 104; 452–453). Moreover, Coker was discharged in the middle of the work week and more than two and one-half weeks before her alleged replacement reported for work (R. 106; Resp. Exh. 433). Another employee in the same section, Mary Lou Partain, was retained even though she was at least as slow as Coker (R. 105; 444–445). In October 1958, after the Union's drive had ended, Coker was rehired for the same work she had performed prior to her discharge (R. 103; 338–339).

(*d*) *Ruth Brooks.*—Ruth Brooks joined the Union in the latter part of November 1957, and attended all of the union meetings, including the one held on January 9, 1958 (R. 112; 386). Scharff admitted that he knew of Brooks' interest in the Union, and had named her as one of those whom he considered to be active in the union drive (R. 112; 353–354, 462–463). Brooks was discharged on January 16, the day following Coker's discharge (R. 109; 387). Hughley, the superintendent of her division, told Brooks that

she did not produce enough. Brooks replied that the real reason was not production but her union activity. Hughley did not deny the accusation, but, instead, replied, "Well, you girls are paying too much attention to this guy from the North [the union organizer] giving you the piece rates on your job, and we cannot afford those rates that they pay up there." (R. 109; 387–388.)

Although Brooks failed to meet the production standard established by the Company, this failure was attributable primarily to the fact that she was required to make repairs on the work of other employees (R. 109–110; 384, 711). Moreover, her production matched that of the three other employees in her section (R. 109; G.C. Exh. 52a–c, 62a–c, 68a–c). Brooks discussed her failure to meet the standard with both Superintendent Hughley and Supervisor Atha, and they had told her not to be concerned about it (R. 109; 117–118, 711).

3. *The layoff of nine employees named by the Union as members of its organizing committee.*—On January 18, 1958, the Union, in an apparent effort to protect the remaining pro-union employees, sent respondent a letter in which it identified twelve employees as members of the Union's volunteer organizing committee, and stated that they had been informed of their rights under the Act to engage in self-organization (R. 113; 472–473). Morris Scharff immediately interrogated every employee named in the letter who was present and working in the coat plant (R. 114; 299, 304–305, 342–343, 360, 366, 374–375, 389, 398, 472). In each case he asked

the employee if she had authorized the Union to use her name. When the employee answered in the affirmative, Scharff placed a check mark beside her name. In some cases Scharff asked whether the employee would withdraw her name from the letter, and warned her of possible adverse consequences if she refused. Employee Ida Harper testified that Scharff "* * * asked me if I wanted to stay on there and I told him, 'Yes.' He said, 'You know what this leads up to.' And put a check mark by my name and walked out" (R. 138; 366). Pauline McGee testified that, after she acknowledged she had permitted the Union to use her name on the letter, Scharff said to her, "'Do you know what this means?' and I said 'Yes sir,' and he said 'Well, all right then'" (R. 141; 305). When Frances Johnson[11] admitted consent to the Union's use of her name, Scharff said, "'Well, if that's the way you want it" (R. 134; 299). Evelyn Hudson testified that, when Scarff showed her the letter, he stated, "'Do you realize Evelyn, that this could work a hardship on you?' And I told him, 'Yes,' that I did. And he said * * * 'Do you want to leave your name on this letter?' I told him, 'Yes.' And he * * * put a check mark by my name and walked away" (R. 126; 398). Scharff then posted the letter with the check marks on the Company bulletin board (R. 114; 397–398, 472).

In the next two weeks, the Company laid off 16 of the 105 employees in the coat plant and several

[11] Sometimes referred to as "Frances Powell," her married name (R. 133).

employees in the pants factory. Of the sixteen in the coat plant, eight were listed in the Union's letter—Harper, McGee, Johnson, Hudson, Wood, Violet Ewing, Hamilton and Hood; the only pants factory employee on the union list, Lela Beaver, was also laid off (R. 114–115, 120, 125, 128, 130, 133, 137, 143, 149; 472).[12]

Prosterman and Scharff testified that the layoff was required because of a cutback in production requirements, and that it had been contemplated as early as December 1957 (R. 113; 443). Prosterman further testified that, in selecting employees for layoff, the Company applied four criteria, in the following order of importance: quality of workmanship, quantity of production, versatility and seniority (R. 116; 402, 449). But subsequently, he and Scharff indicated that the criteria were used interchangeably depending upon the nature of the operation involved (R. 116; 449, 698–699). The reasons assigned for the layoff of the nine employees listed in the Union's letter varied with each employe.

(*a*) *Lela Beaver.*—Lela Beaver was hired for work in the Company's pants division in mid-September 1957 (R. 116; 389). She was frequently so far ahead on her production that she was put on other operations (R. 118; 389). Beaver testified, without con-

[12] Only three employees named in the Union's letter were not laid off. These were Jeanette Beaver, who did not fully affirm her adherence to the letter when questioned by Scharff; Lucy Brooks, who was not questioned because she was absent; and Mary Lou Partain, who was scheduled for layoff but was retained because respondent changed its mind (R. 256, n. 8, 114; 472, 718).

tradiction, that pants division Superintendent Hughley told her that he liked her work and was pleased with her rate of production (R. 116; 389).

Beaver was the only pants division employee named as a member of the organizing committee in the Union's letter of January 18 (R. 116; 472). She was laid off a week thereafter on January 24 (R. 113; 391). According to Beaver's credited testimony, when she asked Hughley why she had been laid off, he told her that he did not know and that she would have to ask Scharff (R. 117; 391). Beaver called Scharff that afternoon, and he, too, stated that he did not know why she was being laid off and told her to contact him later (R. 117; 392). The following week, Beaver further testified, she went to Scharff's office again and told him that she believed her discharge was connected with her union activities. Scharff asked her how she had ever got mixed up with the Union, and added that, if the Union came in, "he would go out the back door." (R. 117; 393.)

At the hearing before the Trial Examiner, Supervisor Edna Atha stated that Beaver was selected for layoff because she was slow to train and that the Company concluded that it would be better to retain the services of an employee who could both set flies and tack belt loops (R. 117; 432, 647).[13] Similarly, Morris Scharff testified that he had made the decision to lay off Beaver, and that his reason for selecting her was

[13] Beaver allegedly could only perform the former operation.

that she was slow to learn and in his opinion not capable of performing two operations (R. 119; 470).[14]

(*b*) *Nellie R. Wood.*—Nellie Wood had ten years' experience in the garment industry when she was hired by respondent in early August 1957 (R. 120; 370). Her work involved the performance of two sewing operations (R. 120; 412). She testified without contradiction that both Scharff and Prosterman commented favorably on her work, and that she had received a raise as recently as two weeks prior to her layoff (R. 120; 373–374).

Wood joined the Union during the organizing drive, and attended all of its public meetings as well as those held at the homes of fellow-employees (R. 120–121; 373). She also solicited other employees to join the Union (R. 131; 373). She was listed in the Union's letter as a member of the organizing committee, and told Scharff, when interrogated by him, that she wanted her name "to stay on" the list, even though he had asked whether she "knew the consequences" (R. 121; 374–375).

Prosterman testified that, although Wood was a satisfactory worker, she was selected for layoff because she had less seniority than two other employees in her section (R. 121; 659–660).[15] Scharff conceded that she

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[14] On April 15, 1958, however, several months after Beaver's layoff but prior to the hearing, Scharff wrote his attorney that he did not know why Mrs. Beaver was laid off but assumed it was because she was an inefficient operator (R. 119; 479).

[15] The seniority advantage was negligible—only about three weeks. Furthermore, Wood could perform more operations, and her production record was higher, than at least one of the retained employees (R. 121–122; 455–456; G.C. Exh. 32a, 58a).

was not selected for layoff because of any criticism of her work (R. 123; 467).[16]

About mid-June 1958, Wood went to see Scharff about reemployment, and told him that she was sorry she had signed an unfair labor practice charge against the Company (R. 124; 375). Scharff suggested that she wait and speak to a Board agent who happened to be coming to the plant that day. In Scharff's presence, Wood told the agent that she wanted to withdraw her charge.[17] Several days thereafter, respondent rehired Wood (R. 124; 548–551).

(*c*) *Evelyn Hudson.*—Evelyn Hudson had about nine years' experience in the needle trades when she was hired by respondent in June 1957. She was assigned to an operation, known as tacking and turning sleeves, in respondent's sleeve section (R. 125; 395). In addition, she was sometimes assigned to other operations in the section, being able to perform them all except for the actual sewing of sleeves (R. 125–126; 395–396). Hudson testified, without contradiction, that both the quality and quantity of her work were satisfactory (R. 125; 396). This is borne out by respondent's records which show that she consistently met her work quota (R. 125; G.C. Exh. 57a).

Hudson joined the Union in November 1957, and attended all of the Union's public meetings (R. 126;

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[16] Prior to the hearing, however, Scharff had written his attorney that inferior quality was the reason for Wood's layoff (R. 123; 720).

[17] The Board has nevertheless provided a remedy for the unfair labor practices against Wood (see R. 125, n. 57). The charges here were filed by the Union and not by the individual employees (R. 124, n. 55).

397). She was also named in the Union's letter as a member of the organizing committee (R. 125; 472). When Scharff interrogated her with respect to the letter, she affirmed her support of the Union. Thereupon, according to her credited testimony, Scharff said, "Do you realize, Evelyn, that this could work a hardship on you?" (R. 126; 398).

Plant Superintendent Prosterman testified that Hudson was selected for layoff because her job was the most mechanical in the section and that, in order to keep training costs down, he had decided to lay off Hudson and divide her work among two other employees (R. 127; 442–443). But, Hudson had already demonstrated her ability to perform the operation handled by both employees who were retained, whereas neither of them had performed more than a single operation, and therefore lacked Hudson's range of experience (R. 127; 424, 442–443, 712).

(*d*) *Violet Ewing.*—Violet Ewing had about two years' experience in the garment industry when hired by respondent in June 1957 (R. 128; 340). Prior to receiving a regular assignment, she worked on a variety of sewing jobs in the plant and obtained experience in several operations (R. 128; 708). According to her credited testimony, her work was not criticized as to either quality or quantity (R. 128; 340).

Ewing joined the Union in November 1957, and attended all of its public meetings (R. 128; 341). Her home was used on one occasion as a union meeting place (R. 121; 373). Her sister-in-law, Supervisor Myrtle Ewing, warned her that Scharff had said

that, "he didn't care how good an operator a girl was, * * * he would fire her if he found out she had joined the Union" (R. 77; 342), and, when Scharff asked Violet Ewing whether she had authorized the Union to use her name in its letter, she affirmed her support of the Union (R. 128; 342).

Prosterman testified that he selected Ewing for layoff because her operation was less difficult to perform than that performed by Margaret Britt, whom he retained (R. 129; 313–314). Ewing had greater seniority than Britt, however, and Prosterman conceded that Ewing's production was better (R. 128–129; 314, 454). Moreover, when Britt took Ewing's job, Britt's job was given to a girl named Madeline who had previously done odd jobs in another section (R. 129; 314–315, 439). No attempt was made to compare Ewing's capabilities with those of Madeline (R. 129; 439). Ewing was eventually rehired on October 7, 1958; Prosterman then told her supervisor that she was a "good operator" who "would not give * * * any trouble" (R. 129; 708).

(*c*) *Bonnie Hamilton.*—Bonnie Hamilton was hired by respondent in July 1957 (R. 130; 355). Her regular assignment was sewing pockets, but she also performed several other operations when occasion demanded (R. 130; 357). Her immediate supervisor, Gerald Carter, as well as Prosterman and Scharff, testified that her work was satisfactory (R. 130; 310, 427, 467). She always met her production quota (R. 130; 355–356).

Hamilton joined the Union during the organizing campaign and attended both the public union meet-

ings and those at the employees' homes (R. 130; 360, 709–710). She was also listed as a member of the Union's organizing committee in its letter to the Company (R. 130; 472). Scharff asked her if her name belonged on the letter, and, when she replied that it did, he commented "well all right," and placed a check mark beside her name (R. 130; 360).

Prosterman testified that Hamilton was laid off because Lucille Yancey,[18] who performed the same operation as Hamilton, "had a greater potential and was a better operator" (R. 131; 310). Employee Nellie Hood (see *infra,* pp. 21–22) testified, however, that Supervisor Carter frequently instructed her to give Yancey's work to Hamilton for repair, stating as he did, "This is some more of Lucille's sorry doings" (R. 131; 382, 555–556). Hood also testified that Carter had never, in her presence, been critical of Hamilton's work (R. 131; 555–556).

(*f*) *Frances Johnson Powell.*—Frances Johnson Powell (hereinafter called Johnson) was hired by the respondent in July 1957 (R. 133; 706–707). At the time of her layoff, she was working in the lining section, and had just received a wage increase (R. 133; 296, 707). Johnson testified that she had never been criticized about her work (R. 133; 297).

Johnson signed a union card, and was also named as a member of the organizing committee in the Union's letter of January 18 (R. 133–134; 297, 472). Scharff interrogated her with respect to the Union's

[18] This is not the same Yancey whose discriminatory discharge has already been discussed (*supra,* pp. 5–7), but another employee by the same name.

use of her name on the letter, and, when she stated that she had authorized it, he said, "Well, if that's the way you want it," and placed a check mark beside her name (R. 134; 299).

At the hearing, Prosterman testified that Johnson was selected for layoff because she was the least competent employee in her section (R. 134; 441–442). He admitted, however, that he had given her a raise in pay, had never criticized the quality of her work, and, indeed, had complimented her work (R. 135; 296, 446–447). Scharff testified that Johnson's work was satisfactory as far as he was concerned and that she was proceeding fairly well in her new duties in the lining section; she was laid off because her work could be absorbed by two other employees (R. 136; 464, 719).[19]

Annie Brooks, an employee who worked in the same section and was retained in preference to Johnson, was discharged shortly after Johnson's layoff (R. 319–320; 715). Prosterman conceded that Brooks had given respondent "fairly constant" trouble with respect to both the quality and quantity of work (R. 136; 715).

(*g*) *Ida Harper.*—Ida Harper was hired by respondent in July 1957 (R. 137; 361). She was assigned to a Lewis blind stitching machine, which is more difficult to operate than the conventional sewing machine (R. 137; 362, 455). When the machine was operating properly and there was sufficient work to do, Harper could stitch as many as 80 to 90 garments

[19] Prior to the hearing, however, Scharff had written his attorney that Johnson was selected for layoff because her work had shown no improvement (R. 136; 720).

an hour (R. 136; 369). However, the machine frequently broke down, and there were periods when there was not enough work to do (R. 137; 362–363). On these occasions, she was assigned inspection work, or told by her supervisor to take time out (R. 137; 362). Harper testified that she had never been told that her work was unsatisfactory (R. 137; 364).

Harper joined the Union, attended a union meeting, and was also a member of the Union's organizing committee (R. 138; 364–365, 472). Scharff questioned her about the use of her name in the Union's letter, and she acknowledged that she had authorized its use. Thereupon, Scharff stated, "You know what this leads up to," placed a check mark beside her name and walked away. (R. 138; 366.)

At the hearing, Prosterman asserted that Harper had a bad make-up record, did not "take kindly" to her supervisor's request for increased production, and had other deficiencies (R. 138; 317–318). Supervisor Ewing also testified that Harper's work was bad (R. 141; 407–408). Ewing later conceded that her discussions with Harper were not "so much [about] bad work, it was just a lack of work" (R. 141; 411). Moreover, Prosterman admitted that Harper was capable of doing rapid work (R. 139; 515), and that, prior to laying her off, he did not compare her performance to that of the replacement employee, whose production record was no better and who had less experience and seniority (R. 143; 715; G.C. Exh. 48a–b).

(*h*) *Pauline McGee.*—Pauline McGee was hired by respondent in August 1957, and assigned to an operation involving two sewing procedures (R. 144; 301–

302). She testified that no supervisor ever criticized either the quality or quantity of her work, and that Prosterman had told her she was doing "fine" (R. 144; 302).

McGee signed a union card, attended two of the Union's public meetings, and solicited other employees to join (R. 144; 303). After the first meeting, she was warned by Supervisor Myrtle Ewing that, "if you don't want to dig your own grave, you had better shut up talking about the Union" (R. 76–77; 304). On being named in the Union's letter as a member of its organizing committee, McGee was interrogated by Scharff, who, when she affirmed the Union's action, replied, "Do you know what this means?" (R. 144; 305).

Plant Superintendent Prosterman testified that he selected McGee for layoff because she was doing a job similar to that performed by another employee, Charlotte Finley, who showed greater potential, and had more seniority (R. 144–145). Although both employees used the same kind of machine, McGee performed an additional operation (R. 144; 311–312). Moreover, Finley required additional training and the help of another employee in order to perform McGee's job, and then attained a production level which was substantially below McGee's level (R. 145–146; 437–438).

(*i*) *Nellie Hood.*—Nelli Hood was hired by the respondent in July 1957. Her principal job was to mark and match various coat parts and to carry bundles to the operators (R. 149; 710). None of respondent's

supervisors or officials ever told her that her work was unsatisfactory, and she was given a pay raise several months after she was hired (R. 149; 378–379).

Hood was a member of the Union, and was named by the Union as a member of its organizing committee (R. 149; 386, 472). She also spoke favorably about the Union to other employees (R. 149; Tr. 529). When Scharff interrogated her with respect to the listing of her name as a member of the organizing committee, Hood affirmed her support of the Union. Scharff replied "all right" and placed a check mark beside her name (R. 149–150; 381).

Prosterman testified that Hood was selected for layoff because her work was of an unskilled nature and could readily be absorbed by other employees (R. 150; 658–659). But there was no effort to compare Hood's work with that of other employees who also performed unskilled work and were retained. Hood had greater seniority than other unskilled employees, including the employee who assumed most of Hood's duties after her layoff (R. 150; Resp. Exh. 9).

B. THE BOARD'S CONCLUSIONS AND ORDER

Upon the foregoing evidence, the Board [20] found that respondent—by its acts of surveillance, interrogation, and threats of economic reprisal—had interfered with, restrained and coerced its employees in the exercise of their rights guaranteed by Section 7, and had thereby violated Section 8(a)(1) of the Act.

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[20] The Board, in all material respects, agreed with and accepted the Trial Examiner's findings and conclusions (R. 252, 257–260).

The Board further found that respondent had discharged Yancey, McCart, Coker and Brooks, and had laid off the nine other employees, because of their union membership and activity, and had thereby violated Section 8(a) (3) and (1) of the Act (R. 252–261).

The Board ordered respondent to cease and desist from the unfair labor practices found, to reinstate and make whole those employees against whom respondent had discriminated, and to post appropriate notices (R. 261–264).

C. THE DECISION OF THE COURT OF APPEALS

The court below—except in two respects[21]—sustained the Board's findings of interference, coercion and restraint, and enforced the order of the Board in respect to those violations. The court, however, concluded that the Board's findings that the discharges and layoffs were discriminatorily motivated were not supported by substantial evidence, and therefore refused enforcement of the Board's order insofar as it related to those violations (R. 725, 730–731, 733). The court accused the Trial Examiner of having drawn "questionable inferences" and of having "uniformly credited all of the General Counsel's evidence and generally disbelieved all of the employer's evidence" (R. 726). The court thereupon concluded that "[t]here was much evidence for the Respondents that the work of the discharged employees was

[21] The court set aside the Board's findings that Scharff's speech (*supra*, pp. 4–5) violated Section 8(a)(1) (R. 723–724). It also rejected the finding that Scharff's interrogation of the employees named by the Union in its letter (*supra*, pp. 10–11) violated that section (R. 731).

unsatisfactory and that this was the sole reason for the discharges" (R. 728), and that "[t]he Respondents' management assigned plausible and reasonable grounds for the selection of each of those who were laid off" (R. 732). In so concluding, the court further stated (R. 732) that "the Board placed its own evaluations upon the factual situations, assumed managerial prerogatives, and reached the conclusions that good business judgment would not have justified the Respondents in their selections for layoffs * * *."[22]

SUMMARY OF ARGUMENT

I

A. Section 10(e) of the National Labor Relations Act provides that, when a court of appeals reviews a Board unfair labor practice order, the "findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive." In *Universal Camera Corp.* v. *National Labor Relations Board,* 340 U.S. 474, 488, the Court held that this standard does not mean that "a court may displace the Board's choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it *de novo.*"

B. The court below has previously adhered to the view that in discriminatory discharge cases, which entail a back pay remedy, a higher standard of proof

[22] The conflicting analyses by the Board and by the court of the evidence with respect to each of the employees are discussed in greater detail in the Argument, *infra*, pp. 38–50.

is required than in cases involving employer interference with union activity, where the only remedy authorized by the Act is a cease-and-desist order. Because of this view, the court has formulated a special rule for guidance in choosing between two inconsistent inferences to be drawn from the record evidence in a discriminatory discharge case, *i.e.*, that the employer's testimony that an employee was discharged for cause must be accepted if the reason assigned is a credible one and if there has been no direct contradiction of such testimony. *National Labor Relations Board* v. *Tex-O-Kan Flour Mills Co.*, 122 F. 2d 433, 438–439 (C.A. 5). Section 10(e) of the Act, however, draws no such distinction between discriminatory discharge cases and other types of unfair labor practice cases, but provides simply that the Board's unfair labor practice findings shall be sustained by a reviewing court if supported "by substantial evidence on the record considered as a whole." The practical effect of the principle applied by the court below is to deny the Board power to find adversely to an employer upon evidence supporting either of two inconsistent inferences. This is contrary to the explicit holding in *National Labor Relations Board* v. *Nevada Consolidated Copper Corp.*, 316 U.S. 105.

Under proper application of the correct standard, the reviewing court may not set aside the Board's conclusion that union activity was the motive for a discharge, where there is evidence which would warrant the inference that a discharge was for union activity, and the Board, after full and fair consideration of the grounds advanced by the employer, has

shown a rational basis for rejecting them as the motivating factor.

II

A. In the present case, the Board found that respondent discharged employees Yancey, McCart, Coker and Brooks because of their union activities, and not for cause as respondent asserted. The Board, *inter alia*, relied on the circumstances that (1) the discharges occurred in the midst of an intensive campaign by respondent to defeat the Union through surveillance of union organizers, interrogation of employees and threats; (2) respondent's officials indicated that they regarded the employees involved as active on behalf of the Union; (3) the reasons advanced by respondent for the discharges were contradictory and did not stand up under scrutiny; and (4) in the case of at least two of the employees (Yancey and Brooks), there was direct evidence that union activity was indeed the reason for the discharge. There was also evidence that the employees were not in all respects "perfect" workers, which could have afforded cause for their discharge. The Board concluded, however, that, in all the circumstances, the more reasonable inference was that the employees' union activities, rather than their work deficiencies, motivated respondent's action.

The inference drawn by the Board was clearly a permissible one on the facts in the record here. Accordingly, under the principles of *Universal Camera, supra*, the Board's conclusions should have been allowed to stand. Instead, the court below, choosing to rely on the evidence showing defects in the employees'

work, upset the Board's inferences and found that the employees were discharged for cause. In so doing, it improperly substituted its judgment for that of the Board on a matter committed to the Board's discretion.

B. The court below also exceeded its reviewing function under the Act in setting aside the Board's further finding that respondent laid off nine other employees because of their union activities. The Board's finding rested, *inter alia*, on the circumstances that (1) the nine employees were listed by the Union as members of its organizing committee; (2) the layoffs occurred after the respondent verified that they were on the committee, attempted unsuccessfully to persuade them to withdraw, and delivered veiled warnings of the consequences if they did not; and (3) as in the case of the four dischargees, the reasons assigned by respondent for selecting the nine employees for layoff did not stand up under scrutiny. Since, in the light of these factors, the Board's inference of anti-union motivation for the layoffs was reasonable, the court below should have permitted it to stand. But, as with the four dischargees, the court, finding that the grounds assigned by respondent for selecting the nine employees were "plausible and reasonable," substituted its judgment for that of the Board and concluded that the selection was based on valid considerations.

ARGUMENT

I

A REVIEWING COURT MAY NOT DISPLACE THE BOARD'S FACTUAL CHOICE BETWEEN TWO CONFLICTING VIEWS IF THE CHOICE IS SUPPORTED BY SUBSTANTIAL EVIDENCE ON THE RECORD AS A WHOLE

A. THE STANDARD OF REVIEW WITH RESPECT TO THE BOARD'S FINDINGS OF FACT

Section 10(e) of the National Labor Relations Act provides that, when a court of appeals reviews an unfair labor practice order, the "findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive." In *Universal Camera Corp.* v. *National Labor Relations Board,* 340 U.S. 474, 488, the Court held that the standard embodied in Section 10(e) permits a reviewing court to set aside "a Board decision when it cannot conscientiously find that the evidence supporting that decision is substantial, when viewed in the light that the record in its entirety furnishes, including the body of evidence opposed to the Board's view." The Court added, however, that (*ibid.*, emphasis added):

> * * * [T]he requirement for canvassing "the whole record" * * * was [not] intended to negative the function of the Labor Board as one of those agencies presumably equipped or informed by experience to deal with a specialized field of knowledge, whose findings within that field carry the authority of an expertness which courts do not possess and therefore must respect. *Nor does it mean that even as to matters not requiring expertise a court may displace the*

> *Board's choice between two fairly conflicting views,* even though the court would justifiably have made a different choice had the matter been before it *de novo.*[23]

Thus, Congress has entrusted to the Board the task of making determinations of credibility and of weighing the conflicting inferences, and its resolution of the conflict is final as long as it is "supported by substantial evidence on the record considered as a whole." Insofar as the Board has credited certain testimony and discredited other testimony, a reviewing court must accept the credited testimony as establishing the underlying facts unless such testimony is plainly improbable or is contradicted by other reliable evidence, or unless an improper basis was used for determining credibility.[24] Insofar as the credited testimony will support conflicting inferences, the inference drawn by

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[23] In this respect, *Universal Camera* reaffirmed a principle which had been enunciated under the earlier Wagner Act. In *National Labor Relations Board* v. *Link-Belt Co.*, 311 U.S. 584, 597, the Court pointed out that "Congress entrusted the Board, not the Courts, with the power to draw inferences from the facts * * *. The Board, like other expert agencies dealing with specialized fields * * * has the function of appraising conflicting and circumstantial evidence, and the weight and credibility of testimony." In *National Labor Relations Board* v. *Nevada Consolidated Copper Corp.*, 316 U.S. 105, 106, the Court stated: "The possibility of drawing either of two inconsistent inferences from the evidence did not prevent the Board from drawing one of them * * *." See, also, *Radio Officers' Union* v. *National Labor Relations Board*, 347 U.S. 17, 48–50.

[24] See *National Labor Relations Board* v. *Dinion Coil Co.*, 201 F. 2d 484 (C.A. 2); Board Brief in *National Labor Relations Board* v. *Florida Citrus Canners Cooperative*, No. 94, this Term, pp. 19–22.

the Board must stand if reasonable "when viewed in the light that the record in its entirety furnishes, including the body of evidence opposed to the Board's view"—even though the court would have "made a different choice had the matter been before it *de novo*" (*Universal Camera, supra,* 340 U.S. at 488).

Congress has restricted judicial review of Board findings of fact for two basic reasons. First, resolutions of credibility depend to a great extent on the witnesses' demeanor, which the officer who presided at the hearing (the Board Trial Examiner) is best qualified to evaluate. Second, if the reviewing court were free to find the facts *de novo* or to reweigh the inferences drawn by the Board, it would defeat "the intention of Congress to apply an orderly, informed and specialized procedure to the complex administrative problems arising in the solution of industrial disputes." *National Labor Relations Board* v. *Waterman Steamship Corp.,* 309 U.S. 206, 208. The drawing of inferences involves the application of the lesson of experience. The determination whether discharges or layoffs were prompted by an employer's anti-union attitude or by an employee's work deficiencies ordinarily requires the application of the Board's cumulative insight to the resolution of difficult, and often close, factual issues. The resolution of those issues is, therefore, precisely the kind of question that Congress committed to the Board's expert judgment with only limited judicial review.

B. THE STANDARD OF REVIEW IS THE SAME FOR DISCRIMINATORY DISCHARGE CASES AS IT IS FOR OTHER TYPES OF UNFAIR LABOR PRACTICES

1. The court below has adhered to the erroneous view (see *infra*, pp. 34–37) that in discriminatory discharge cases, which entail a back pay remedy, a higher standard of proof is required than in cases involving employer interference with union activity, where the only remedy authorized by the Act is a cease-and-desist order.[25] The court first expressed this view in *National Labor Relations Board* v. *Tex-O-Kan Flour Mills Co.*, 122 F. 2d 433 (C.A. 5), where, in summarily enforcing the Board's findings of interference and restraint in violation of Section 8(a)(1) while setting aside most of the findings of discriminatory discharge, it stated (*id.* at 438):

> It is quite easy for management to freely recognize and sincerely and openly acknowledge the right to self-organization established by the Act; a cease and desist order on this point costs no money and only warns to observe a right which already existed; evidence short of demonstration may easily justify such an order.
>
> Orders for reinstatement of employees with back pay are somewhat different. They may impoverish or break an employer, and while they are not in law penal orders, they are in the nature of penalties for the infraction of

[25] The court's misapplication of the substantial evidence standard of review has not been confined to discriminatory discharge cases alone, however. See *National Labor Relations Board* v. *Florida Citrus Canners Cooperative*, No. 94, this Term; *National Labor Relations Board* v. *Fant Milling Co.*, 360 U.S. 301, 309, n. 10.

> law.[26] The evidence to justify them ought therefore to be substantial, and surmise or suspicion, even though reasonable, is not enough * * *.

Because of this view, the Fifth Circuit in *Tex-O-Kan* (122 F. 2d at 438–439) formulated a special rule for guidance in choosing between two inconsistent inferences to be drawn from the record evidence in a discriminatory discharge case, *i.e.*, that the employer's testimony that the employee was discharged for cause must be accepted if the reason assigned is a credible one and there has been no direct contradiction of such testimony. The Board may not draw the inference that the discharge was for union activity, even though the latter inference was also reasonable and the Board had judged that reason stronger under the circumstances. Nor, indeed, may the Board discredit the employer's testimony unless it is specifically contradicted by other testimony.[27]

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[26] The Fifth Circuit itself recognized at an early date, however, that a back pay remedy is not penal and does not vindicate private rights, but that, like a cease-and-desist order, it is issued to redress a "public" wrong. *Agwilines* v. *National Labor Relations Board*, 87 F. 2d 146, 150-151 (C.A. 5).

[27] "There is no doubt that each employee here making complaint was discharged, or if laid off was not reemployed, and that he was at the time a member of the union. In each case such membership may have been the cause, for the union was not welcomed by the persons having authority to discharge and employ. If no other reason is apparent, union membership may logically be inferred. Even though the discharger disavows it under oath, if he can assign no other credible motive or cause, he need not be believed. But it remains true that the discharger knows the real cause of discharge; it is a

Since *Tex-O-Kan*, the Fifth Circuit has continued to adhere to its view of discriminatory discharge cases.[27] Although the court readily enforces a cease-and-desist order directed against employer interference and restraint in violation of Section 8(a)(1) of the Act, it continues to overturn the Board's findings of discriminatory discharge if the employer can point to some incident or shortcoming on the part of the employee which *might* have been cause for the discharge; in fact, the court appears to follow this course without regard to the strength of the inference of anti-union motivation to be derived from admissions, the employer's knowledge of the em-

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fact to which he may swear. If he says it was not union membership or activity, or something else which in fact existed as a ground, his oath cannot be disregarded because of suspicion that he may be lying. There must be impeachment of him, or substantial contradiction, or if circumstances raise doubts they must be inconsistent with the positive sworn evidence on the exact point. This was squarely ruled as to a jury in *Pennsylvania R.R. Co.* v. *Chamberlain*, 288 U.S. 333 * * *, and the ruling is applicable to the Board as fact-finder * * *" (122 F. 2d at 438–439).

[28] See *National Labor Relations Board* v. *Houston Chronicle Publishing Co.*, 211 F. 2d 848, 853–854 (C.A. 5); *National Labor Relations Board* v. *Huber & Huber Motor Express, Inc.*, 223 F. 2d 748, 749 (C.A. 5); *National Labor Relations Board* v. *Rutter-Rex Mfg. Co.*, 229 F. 2d 816, 819 (C.A. 5); *National Labor Relations Board* v. *Ingram*, 273 F. 2d 670, 673 (C.A. 5).

[29] See *National Labor Relations Board* v. *McGahey*, 233 F. 2d 406 (C.A. 5). But cf. *National Labor Relations Board* v. *Florida Citrus Canners Cooperative*, 288 F. 2d 630, 638–639 (C.A. 5), certiorari granted, No. 94, this Term.

ployee's union activities, or the proof of other unfair labor practices (see Pet. 14, 16–17).[30]

2. Section 10(e) of the Act draws no distinction between discriminatory discharge cases and other types of unfair labor practice cases; and it imposes no re-

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[30] The most recent example of the Fifth Circuit's practice in this regard is *Frosty Morn Meats, Inc.* v. *National Labor Relations Board*, No. 18,464, decided November 30, 1961, 49 LRRM 2159. There the record showed that employee Judkins, who was a leader in the union movement, was discharged after Plant Manager Camp had warned that the plant would be shut down if the union came in and had threatened to fire Judkins if Camp learned that Judkins was a union adherent. The court accepted this evidence, sustained the Board's finding that the threats violated Section 8(a)(1), and conceded that these circumstances would "support an inference that Judkins's discharge was in response to his union leadership" (49 LRRM at 2162). Nevertheless, finding evidence that would have afforded good cause for his discharge, the court declined to sustain the Board's finding that Judkins was discharged because of his union activity. The Court reasoned as follows (49 LRRM at 2162–2163): "If * * * the misdeeds of the employee are so flagrant that he would almost certainly be fired anyway there is no room for discrimination to play a part. The employee will not have been harmed by the employer's union animus, and neither he nor any others will be discouraged from membership in a union since all will understand that the employee would have been fired."

Compare, in contrast, the approach of the Eighth Circuit in *National Labor Relations Board* v. *Des Moines Foods, Inc.*, No. 16,694, decided November 29, 1961, slip op. 9: "We think that the most that can be claimed by the respondent is that the evidence is consistent with the hypothesis that Mrs. Hay was discharged because of her activities on behalf of the Union and with the hypothesis that she was discharged for misconduct. The Supreme Court, in *National Labor Relations Board* v. *Nevada Consolidated Cooper Corp.*, 316 U.S. 105, 106, has said: 'The possibility of drawing either of two inconsistent inferences from the evidence did not prevent the Board from drawing one of them * * *.'"

quirement that, in discriminatory discharge cases, an employer's credible explanation of the reasons for discharge must be accepted unless directly contradicted. It provides simply that the Board's unfair labor practice findings shall be sustained by the reviewing court if supported "by substantial evidence on the record considered as a whole." This Court made plain in *National Labor Relations Board* v. *Nevada Consolidated Copper Corp.*, 316 U.S. 105—a discriminatory discharge case decided after *Tex-O-Kan*—that the "substantial evidence" standard does not deny to the Board the power to find adversely to the employer upon evidence supporting either of two inconsistent inferences.[31] The view that a witness' testimony cannot be discredited unless directly contradicted overlooks the fact that the witness' demeanor when he testifies may itself be sufficient to "satisfy the tribunal, not only that the witness' testimony is not true, but that the truth is the opposite of his story * * *." L. Hand, J., in *Dyer* v. *MacDougall*, 201 F. 2d 265, 269 (C.A. 2).[32]

In the present case, the Board found that the employer discharged and laid off certain employees for union activities rather than for cause, as the employer contended. The question of the employer's true motive is one of fact. There are often conflicts in the testimony and "direct evidence of a purpose to violate the

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[31] As *Universal Camera* recognizes, this principle was not altered by the 1947 amendments to the Act (see *supra*, pp. 28–29).

[32] See, also, *National Labor Relations Board* v. *Howell Chevrolet Co.*, 204 F. 2d 79, 86 (C.A. 9), affirmed, 346 U.S. 482. Board Brief in *National Labor Relations Board* v. *Florida Citrus Cooperative Canners*, No. 94, this Term, pp. 19–20.

statute is rarely obtainable" (*Hartsell Mills Co.* v. *National Labor Relations Board*, 111 F. 2d 291, 293 (C.A. 4)). Accordingly, proof of motive usually requires the Board (as it did here) to determine the credibility of witnesses and to draw inferences from the credited testimony.[33]

Contrary to the Fifth Circuit's view (see R. 732–733; *National Labor Relations Board* v. *McGahey*, 233 F. 2d 406, 412–413 (C.A. 5)), when the Board does determine that the reason given by the employer was not the real motive for the employee's discharge, the Board does not interfere with "managerial prerogatives" and "good business judgment." In making an evaluation of the employer's reasons, the Board does not undertake to judge whether they are economically sound or otherwise prudent. The reasonableness of the cause assigned is assessed merely as an evidentiary factor bearing on the probability of whether it is the real cause. For example, if the reason given is not one for which discharges are ordinarily made, the testimony that it was the real cause does not carry the kind of persuasion to offset an inference of a discriminatory motive, flowing from other evidence, which a "good" cause would carry. In short, an employer may discharge for any reason—good or bad—unconnected with union or organizational activity, provided that the reason given was in fact the real reason; in this sense, the employer's managerial pre-

[33] This conclusion is also true with respect to the analogous problem of establishing that the employer has failed to bargain in good faith. That problem is presented in the related case, *National Labor Relations Board* v. *Florida Citrus Canners Cooperative*, No. 94, this Term.

rogatives and right to exercise his own business judgment are unaffected by the Act.[34] Where there is evidence which would warrant the inference that a discharge was for union activity, however, the fact that the grounds assigned by the employer are not plausible in the circumstances presented is relevant to the question of whether it or the union activity was the real reason for the discharge.[35] Once the Board, after full and fair consideration of the employer's defenses, shows rational grounds for rejecting them, the reviewing court may not set aside the Board's ultimate conclusion, based on substantial evidence, that the union activity was the motive for the discharge.

II

SUBSTANTIAL EVIDENCE ON THE RECORD AS A WHOLE SUPPORTS THE BOARD'S FINDINGS THAT THE EMPLOYEES WERE DISCHARGED AND LAID OFF BECAUSE OF THEIR UNION ACTIVITIES

In the present case, the Fifth Circuit once again has adhered to the standard it enunciated in the *Tex-*

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[34] See *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 45.

[35] The foregoing analysis is not affected by the provision in Section 10(c) of the Act, added by the 1947 amendments, that no "order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged * * * if such individual was suspended or discharged for cause." The purpose of this provision is to emphasize that, if cause exists for the discharge of an employee, the Board cannot disregard it and find an anti-union motive merely because the employee also happened to be active on behalf of the union. However, the provision was not intended to deprive the Board of power to weigh the cause factor on the one hand, and the anti-union factor on the other, and determine which was the motivating force in the particular case. See *National Labor Relations Board* v. *Dixie Shirt Co.*, 176 F. 2d 969, 974 (C.A. 4).

O-Kan case, *supra,* and has upset the Board's findings of fact in a discriminatory discharge case where, on the basis of the entire record, the findings plainly were not irrational. The Board's inference that the discharges and layoffs were motivated by the employees' union activities was a permissible one on this record. Nevertheless, the court, by ignoring credited testimony and relying on disputed evidence of poor workmanship or low production which *might* have afforded the employer good cause for his action, concluded that the stronger inference was that the employees were discharged or laid off because of their deficiencies, and thereupon set aside the Board's findings. In short, contrary to the admonition in the *Universal Camera* case, *supra,* the court of appeals undertook to weigh the evidence *de novo,* and to substitute its judgment for that of the Board even though the Board's findings were reasonable.[36]

A. THE DISCHARGES

The discharges of employees Yancey, McCart, Coker and Brooks occurred in the midst of an intensive campaign by respondent to defeat the Union, not merely by expressing its opposition to the Union, but by such coercive measures as surveillance of union organizers, interrogation, and threats to employees—action which the court below agreed (R. 724–725) violated Section 8(a)(1) of the Act. This

[36] Similarly, in *National Labor Relations Board* v. *Florida Citrus Canners Cooperative*, No. 94, this Term, the court below undertook to set aside the Board's determination of the credibility of witnesses even though such determination was not irrational.

evidence of active hostility to the Union furnishes strong support for the Board's conclusion that the discharges were motivated by the same consideration.[37] An analysis of the evidence pertaining to the discharges confirms this conclusion.

1. Lucille Yancey, who was believed by the Trial Examiner and the Board,[38] testified that, the day after her discharge, Morris Scharff, respondent's principal operating official, told her that she was being discharged because he had heard that she and her husband had been "working with the union organizers," and that she could be reinstated only if the Union drive failed (see the Statement, *supra*, p. 6). Such direct evidence that union considerations motivated Yancey's discharge, by itself, negates the testimony of respondent's witnesses that Yancey was discharged because of poor work and an uncooperative attitude. These other explanations are further undermined by Yancey's credited testimony that she had never been criticized about her work prior to her discharge and that Plant Superintendent Prosterman, when he discharged her, had merely stated that there was not enough work (see the Statement, *supra*, pp. 6–7).

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[37] See *National Labor Relations Board* v. *Harris-Woodson Co.*, 162 F. 2d 97, 101 (C.A. 4); *Angwell Curtain Company* v. *National Labor Relations Board*, 192 F. 2d 899, 903 (C.A. 7).

[38] Here, unlike in *Florida Citrus*, No. 94, this Term, the Court did not purport to overturn any of the testimony which the trial examiner and the Board had specifically credited.

On the basis of these facts, the Board was not only reasonable, but manifestly correct, in finding that Yancey was discharged because of her union activity. The court below arrived at a contrary conclusion only by ignoring credited testimony, and by relying on an irrelevancy. Thus, the court, although referring to Yancey's conversation with Scharff (R. 728), omitted mention of the portion of her testimony in which she stated that Scharff had acknowledged that the discharge was attributable to her work on behalf of the Union and had conditioned her reemployment upon the defeat of the Union. Moreover, although the court concluded that Yancey was not very active in the union campaign (R. 729), that fact is immaterial, since Yancey's testimony showed that respondent believed she was "working with the union organizers."[39]

2. The evidentiary basis for the Board's findings respecting the other discharges is equally substantial, and the court's action in setting those findings aside was likewise unjustified.

(*a*) In the case of Grace McCart, the record shows (see the Statement, *supra*, pp. 7–8) that respondent discharged her the day after she attended a union meeting and signed a card. At the time of her discharge Superintendent Prosterman told her that her discharge was for bad work, but, when she later questioned Scharff about the reason for dismissal,

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[39] See *National Labor Relations Board* v. *Link-Belt Co.*, 311 U.S. 584, 589–590; *National Labor Relations Board* v. *Ridge Tool Co.*, 211 F. 2d 88 (C.A. 6), enforcing, 102 NLRB 512, 513.

he asked whether she had attended a union meeting the night before. McCart admitted that she had, and accused Scharff of discharging her because of her union activity. Scharff continued his inquiry concerning the union meeting, asking McCart to name other employees who had attended. Since she was reluctant to do so, Scharff proceeded to list three employees whom he regarded as active on the Union's behalf. Although there was evidence that McCart had occasionally turned out garments which were improperly sewn, there was also evidence that the machine on which McCart worked required frequent repairs, that McCart had not been criticized about her work prior to her discharge, and that she was rehired to perform the same operation after the Company had defeated the Union. Weighing all of this evidence, the Board could well conclude, as it did, that union activity rather than poor performance was the reason for McCart's discharge.

(*b*) Pearl Coker (see the Statement, *supra*, pp. 8–9) was discharged the day after Scharff, in his interrogation of McCart, had named Coker as an active union supporter. Scharff told Coker that, while her work was "nice," she was not earning enough. There was evidence that Coker did not meet her production quota. On the other hand, Coker testified that she had not previously been warned about her work; Prosterman conceded that she had been improving; Coker's discharge occurred in the middle of the work week and more than two and one-half weeks before her alleged replacement reported for work; another employee in the same sec-

tion was retained though she was at least as slow as Coker; and Coker was rehired for the same work after the union drive had ended. Balancing the evidence of Coker's shortcoming against the timing of her discharge, the lack of any prior warning, and respondent's active hostility to the Union, the Board was not unreasonable in concluding that the inference that Coker was discharged because of her union activity was stronger than the inference that the discharge was attributable to her low production rate.[40]

(*c*) Ruth Brooks (see the Statement, *supra*, pp. 9-10) was discharged two days after Scharff had indicated, in his conversation with McCart, that he had regarded her, too, as strongly "pro-union" and active in the organizing effort. Her supervisor, Hughley, told her that low production was the reason for her discharge. But, when Brooks disputed this reason and accused Hughley of discharging her because of her union activities, Hughley replied, "Well, you girls are paying too much attention to this guy from the North [the union organizer] giving you the piece rates on your job, and we cannot afford those

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[40] See *National Labor Relations Board* v. *Link-Belt Co.*, 311 U.S. 584, 589-590 (discharges without prior warning); *North Carolina Finishing Co.* v. *National Labor Relations Board*, 133 F. 2d 714, 717 (C.A. 4), certiorari denied, 320 U.S. 738 (retention of less efficient employees, and questioning of others concerning the discriminatee's union activities); *E. Anthony & Sons* v. *National Labor Relations Board*, 163 F. 2d 22, 26-27 (C.A.D.C.), certiorari denied, 332 U.S. 773 (summary discharges, without preliminary warning; discharges occurred right after the union was formed and against a background of employer hostility).

rates that they pay up there." Opposed to this evidence, which supports the inference that union activity was the reason for Brooks' discharge, was evidence showing that she did not meet her production quota. According to Brooks' uncontradicted testimony, however, she was constantly required to make repairs on other employees' work; she brought this fact to the attention of her supervisors; and they, in turn, had given her assurance that they were aware of her extra burden and that she did not have to worry about her production. Moreover, Brooks' production record matched that of the three other employees in her section, who did no extra repair work; none of these employees was discharged. On these facts, the Board was clearly warranted in concluding that the stronger inference was that Brooks was discharged because of her union activities.

The court below rejected the Board's conclusions with respect to McCart, Coker and Brooks because evidence existed that each employee was deficient in her work, and could properly have been discharged for this reason (R. 730–731). But whether the evidence of work deficiency was in fact the reason for the discharges requires an evaluation of that evidence in the light of the other evidence pointing to an anti-union motive for the discharges. Although "the discharge of an inefficient or insubordinate union member or organizer is lawful, it may become discriminatory if other circumstances reasonably indicate that the union activity weighed more heavily in the decision to fire him than did dissatisfaction with his performance." *National Labor Relations Board* v.

Whitin Machine Works, 204 F. 2d 883, 885 (C.A. 1). The court summarily dismissed the fact that respondent had rehired McCart and Coker (R. 730), and ignored and misinterpreted the evidence of respondent's anti-union motivation. Thus, in McCart's conversation with Scharff, the court concluded that, since it was McCart who asserted that she was discharged for union activity, this was merely "a self-serving" opinion entitled to no weight (R. 730). But this conclusion overlooks the fact that Scharff himself had opened the subject by asking McCart whether she had attended the union meeting the night before, and then had gone on to request her to name other employees who were there as well. In this context, it is fair to treat Scharff's actions as an admission that union activity was the real reason for McCart's discharge. Similarly, in the case of Coker, the court assumed that the only basis for concluding that union activity motivated the discharge was "respondent's unconceded animosity toward the union" (R. 730)—an assumption which ignores all of the other circumstances outlined above. And, in the case of Brooks, the court completely ignored, *inter alia*, Brooks' conversation with supervisor Hughley.

In any event, the function of weighing the conflicting inferences to be drawn from the evidence, is that of the Board and not of the reviewing court (see *supra*, pp. 29–30). The inferences drawn by the Board are not to be upset if reasonable, and those with respect to McCart, Coker, Brooks—as well as Yancey—clearly were permissible.

B. THE LAYOFFS

The layoffs of the nine employees occurred on the heels of the prior discharges for union activity and shortly after respondent received the Union's letter indicating that the Union was continuing its campaign. Scharff, in questioning the employees listed in the letter, had urged them to withdraw their support of the Union and had suggested that "hardship" would follow if they did not; and, of the employees laid off, an unusually high proportion of those listed in the union letter were included (see the Statement, *supra*, pp. 11-12).[11] These circumstances, coupled with respondent's extensive program of restraint and coercion in contravention of Section 8(a)(1), furnish ample support for the Board's inference that the selection of the nine members of the union committee for layoff was attributable to their union activity. See *National Labor Relations Board* v. *Carolina Mills*, 190 F. 2d 675, 676 (C.A. 4).

Although there was evidence that a layoff was economically justified, that it had been decided upon prior to receipt of the Union's letter,[12] and that in some instances and in some respects the ostensible

[11] As the Board pointed out (R. 114-115, 153, 256), the only pants plant employee on the union list was laid off, and the fifteen percent reduction in force in the coat plant encompassed eight out of eleven, or over seventy percent, of the union committee in that plant. See *National Labor Relations Board* v. *Sifers Candy Company*, 171 F. 2d 63, 65-66 (C.A. 10). As to the three employees in the union letter who were not laid off, see n. 12, *supra*, p. 12.

[12] There is no evidence that the Union knew that a layoff was contemplated at the time it sent its letter.

grounds asserted by respondent for the selection of the nine employees actually existed, in other instances and in other respects the ostensible grounds for the layoffs were disproved by evidence which the Board believed. Respondent's witnesses were often not consistent; the reasons which they gave at the hearing were contrary to the ones given to the employee at the time of the layoff; and respondent's explanation was, in any event, often negated by credited employee testimony.

For example, the reason assigned at the hearing for the discharge of Lela Beaver was that she was slow to train and could perform only one operation. Yet Beaver, whose testimony was credited, stated that her superintendent, Hughley, had praised her work and had put her on other operations; that, when he laid her off, Hughley gave no explanation but referred her to Scharff; and that Scharff, in turn, had asked her how she ever got mixed up with the Union (see the Statement, *supra,* pp. 12–14).

Nellie Wood was laid off even though it was conceded that she was a competent and experienced worker, who had just recently received a wage increase; she was allegedly selected because she had less seniority than two other employees. But the seniority advantage of the other two employees was negligible and Wood was a more versatile operator. Moreover, when, after her layoff, she told Scharff that she was sorry about signing an unfair labor practice charge against the Company and wanted to withdraw it, she was reemployed (see the Statement, *supra,* pp. 14–15).

Bonnie Hamilton also was admittedly a satisfactory worker who always met her production quota. She was selected for layoff allegedly because another employee who performed the same operation "had a greater potential and was a better operator." The work of the other employee had frequently been criticized, however, and Hamilton had been given the other employee's garments to repair (see the Statement, *supra*, pp. 17–18).

Frances Johnson was selected for layoff, according to Superintendent Prosterman, because she was the least competent employee in her section. But he later admitted that he had given her a raise in pay, had never criticized the quality of her work, and had, indeed, complimented her, and Scharff testified that Johnson's work was satisfactory as far as he was concerned, and that she was laid off because her work could be absorbed by two other employees (see the Statement, *supra*, pp. 18–19).

In short, the grounds assigned by respondent, especially since they were often inconsistent or impaired by other evidence,[43] were not so compelling as to override the evidence of anti-union motivation for the layoffs. Cf. *National Labor Relations Board* v. *Pittsburgh S.S. Co.*, 340 U.S. 498, 502. It was therefore not unreasonable for the Board to conclude that, on balance, the stronger inference was that the nine employees were in fact selected for layoff, not for

[43] See *National Labor Relations Board* v. *Bird Machine Co.*, 161 F. 2d 589, 592 (C.A. 1); *National Labor Relations Board* v. *Dinion Coil Co.*, 201 F. 2d 484, 486 (C.A. 2); *National Labor Relations Board* v. *Radcliffe*, 211 F. 2d 309, 313–314 (C.A. 9).

the reasons given by respondent, but because they were on the Union's organizing committee.

Nor is a different conclusion required because of the considerations set forth by the court below. The court rejected the Board's finding of anti-union motivation for two reasons. The first reason was that "[t]he selection of the employees to be laid off had been determined before the union's warning had been delivered, if the witnesses for the Respondents are to be believed" (R. 732). But even the court observed that the respondent's witnesses "were not believed by the Examiner or the Board" (R. 732). Since the resolution of credibility is a task which is entrusted to the trier of fact—the Trial Examiner—because he has the "superior opportunity * * * to observe the demeanor of the witnesses" (*Motorola, Inc.* v. *National Labor Relations Board*, 199 F. 2d 82, 83 (C.A. 9), certiorari denied, 344 U.S. 913), the court was in no position to upset the Examiner's evaluation of the testimony and his resolution of credibility (see Board Brief in *National Labor Relations Board* v. *Florida Citrus Canners Cooperative*, No. 94, this Term, pp. 19–20).

The court itself attached little relevance to its first reason, for it rested its holding on the determination that "[t]he Respondents' management assigned plausible and reasonable grounds for the selection of each of those who were laid off" (R. 732). Even if this reason be assumed to be true, it does not follow that those grounds actually motivated respondent to select the nine employees in issue. At best the record merely shows that some of the employees had certain

shortcomings, while, as to other employees, there was a dispute as to their shortcomings, and that these shortcomings *might* have led to the selection of the nine employees for layoff. On the other hand there was strong evidence tending to show that the Company, which was strongly anti-union, selected the employees for layoff when it became aware of their union organizing activities. It was for the Board to determine what was in fact the true motive for the layoffs by considering each of the two possible inferences from the evidence in the record and balancing one against the other. The court, overlooking most of the evidence and depreciating the remainder,[11] concluded that, since respondent gave reasons for the selection, which would have been valid had they been the real reasons, the Board was in effect barred from finding that respondent laid off the employees for their union activities, in violation of Section 8(a)(3) and (1) of the Act. The court's action in this

[11] Thus, the court viewed Scharff's interrogation of the employees named in the letter as merely an effort to check the correctness of the Union's statement they were on the organizing committee (R. 731), but this interpretation does not explain Scharff's veiled threats to certain of the employees when they refused to withdraw their names (see the Statement, *supra*, pp. 10-11), which the court does not mention. Similarly, the court pointed out that the Board made no comparison between the union activity of the employees laid off and those retained (R. 732). But the mere fact that respondent did not lay off all the union adherents does not establish that it did not discriminate as to others. See *National Labor Relations Board* v. *Link-Belt Co.*, 311 U.S. 584, 602. Moreover, the reason for singling out the nine employees involved was because they were listed as members of the Union's organizing committee (see, also, n. 12, *supra*, p. 12).

regard was clearly erroneous, for the Board in each instance must find the true reason for a discharge or a layoff regardless of reasons given by an employer. Once the Board makes its determination and once that determination is "supported by substantial evidence on the record considered as a whole," as it was in the present case, the Board's determination is "conclusive" (Section 10(e) of the Act).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the court below, insofar as it rejected the Board's findings that the discharges and layoffs were discriminatorily motivated, in violation of Section 8(a) (3) and (1) of the Act, should be reversed and the case should be remanded to that court with directions to enforce those portions of the Board's order relating to the discharges and layoffs.[46]

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[46] The court below has already enforced the other portions of the order (see the Statement, *supra*, p. 23).

APPENDIX

The relevant provisions of the National Labor Relations Act (61 Stat. 136, as amended, 29 U.S.C. 151, *et seq.*, and Supp. II) are as follows:

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

UNFAIR LABOR PRACTICES

SEC. 8 (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8(a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following

the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9(a), in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 9(e) within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: *Provided further,* That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

* * * * *

SEC. 10. (c) The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderence of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with

or without back pay, as will effectuate the policies of this Act: *Provided*, That where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him: *And provided further*, That in determining whether a complaint shall issue alleging a violation of section 8(a)(1) or section 8(a)(2), and in deciding such cases, the same regulations and rules of decision shall apply irrespective of whether or not the labor organization affected is affiliated with a labor organization national or international in scope. Such order may further require such person to make reports from time to time showing the extent to which it has complied with the order. If upon the preponderance of the testimony taken the Board shall not be of the opinion that the person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint. No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause. In case the evidence is presented before a member of the Board, or before an examiner or examiners thereof, such member, or such examiner or examiners, as the case may be, shall issue and cause to be served on the parties to the proceeding a proposed report, together with a recommended order, which shall be filed with the Board, and if no exceptions are filed within twenty days after service thereof upon such parties, or within such further period as the Board may authorize, such recommended order shall become the order of the Board and become effective as therein prescribed.

* * * * *

(e) The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence

so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

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